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No. 84-261

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER

v.

GARY WEINTRAUB, ET AL.

BRIEF OF JOHN K. NOTZ, JR., TRUSTEE,
AS AMICUS CURIAE IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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STATEMENT OF INTEREST

The issue presented in this case is whether a Chapter 7 trustee of a corporation which is a debtor in a bankruptcy liquidation proceeding has the power to claim or waive that debtor's pre-petition attorney-client privilege. John K. Notz, Jr. is the Trustee for the debtor, Chicago Discount Commodity Brokers, Inc. ("CDCB"), and it is his waiver of the debtor's pre-petition attorney-client privilege that is at issue here.

The decision below has had a significant impact on the Trustee's ability to discharge his duties to the estate, and will have a similar impact on other private trustees for

corporate debtors. The Trustee is personally familiar with the facts surrounding the waiver at issue here and the general administration of the CDCB estate. Both the Solicitor General and the Respondents have consented to the filing of this brief, and their written consent is on file with the Clerk of this Court.

STATEMENT OF FACTS

Because the Solicitor General has adequately set forth the factual background of this case, the Trustee will not expand on that statement, but will concentrate on the practical reasons why a writ of certiorari should be granted in this case.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Will Substantially Impair A Chapter 7 Trustee's Ability To Fulfill His Statutory Duties And Will Cause Increased Delay And Expense In Bankruptcy Proceedings

A trustee under Chapter 7 of the Bankruptcy Code (the "Code") is required to collect and reduce to money the assets of the estate and to close up the estate as expeditiously as is compatible with the best interests of parties in interest. 11 U.S.C. § 704. Because the property of the estate includes causes of action which belong to the debtor when the petition is filed, 11 U.S.C. § 541; 4 *Collier On Bankruptcy*, ¶541.10 (15th Ed. 1984), the trustee is required to investigate and prosecute these actions for the benefit of the estate. The Seventh Circuit's holding that the Trustee does not have the right to control the assertion or waiver of the debtor's pre-petition attorney-client privilege has inhibited the Trustee's ability to fulfill these duties.

The value of the right to control the assertion or waiver of the privilege is graphically illustrated here. The Trustee has filed more than seventy-five separate adversary proceedings seeking to recover a total amount of more than \$6,000,000. See

Appendix to Brief of John K. Notz, Jr., Trustee, as Amicus Curiae, pp. 1-4 [hereinafter cited as Amicus Appendix]. The Trustee sought to depose Mr. Weintraub on November 17, 1981, and on December 16, 1981, as part of his investigation into potential claims. At this deposition the Trustee attempted to elicit information about certain persons against whom the Trustee later filed adversary proceedings, but Weintraub refused to answer on the grounds of attorney-client privilege. Amicus Appendix, pp 5-41. Weintraub also refused to produce documents under a claim of attorney-client privilege and generally thwarted the Trustee's attempts to learn about the day to day operations of the debtor. As a result, the Trustee's accountants and attorneys were forced, at the expense of the estate, to reconstruct the operations of CDCB in order to learn what Weintraub refused to tell.

The Trustee's still pending adversary proceeding against Frank McGhee, Goodman-Manaster and Company, Inc., and Thomas Suba is an example of the possible value of the right to control the attorney-client privilege. In that case the Trustee sought \$3,119,576.25 in damages, alleging, *inter alia*, that the defendants violated various provisions of the Commodity Exchange Act in a scheme to use customer funds as margin for Frank McGhee's personal trading account at Goodman-Manaster. The Trustee has settled with Frank McGhee¹ and obtained a default judgment against Thomas Suba, but the remaining claims against Goodman-Manaster for \$1,361,285.64 are presently pending.

This adversary proceeding began with a one count complaint for approximately \$440,000 against Frank McGhee, filed in November, 1980. The claim against Goodman-Manaster was not filed until November 4, 1982. Mr. Weintraub and other CDCB pre-petition counsel may have had

¹See Settlement Agreement with Frank McGhee, Amicus Appendix at 63, which provides that Frank McGhee agrees to cooperate with, disclose to, and submit to examination by the Trustee. *Id.* at 68.

information relevant to this claim, but they have refused to give the Trustee this information. The Trustee has been forced to spend considerable sums in lawyers' and accountants' fees in investigating this action without pre-petition information obtained from the debtor's counsel. Moreover, if the Court of Appeals' ruling stands, the Trustee may never know if he discovered all of the pertinent facts.

Although the Trustee was frustrated by Mr. Weintraub's refusal to testify, the Trustee was greatly aided in his investigation by materials discovered in the files of other CDCB attorneys. One of the documents first found in these files was a cross-collateralization agreement among CDCB's officers, directors and shareholders. The Trustee has relied on this document to prosecute actions and deny claims of CDCB insiders. See items 7 and 8 of Appendix A. Under the ruling of the Court of Appeals, future trustees might be denied access to similar materials.

This Trustee's experience amply illustrates the value of the right to control the waiver or assertion of the debtor's pre-petition attorney-client privilege. If a trustee is to perform his duties under the Code efficiently, he must have this right. The Court of Appeals' ruling will have the practical effect of ensuring that all future trustees are as handicapped as this Trustee has been handicapped in his ability to investigate and prosecute actions, particularly actions against insiders of the debtor.

B. The Holding Below Would Allow Dishonest Management To Protect Itself From Personal Liability To The Estate

Under the ruling below, management which knew it was guilty of improper and actionable conduct could seal off a major source of evidence, and the trustee would not be able to compel testimony from pre-petition counsel regarding their acts.

This case provides a compelling example of the possible abuse inherent in the decision below. All of the parties

asserting the CDCB's attorney-client privilege (defendant Weintraub and intervenors Frank and Andrew McGhee) and all other CDCB "insiders" who benefit from their assertion of the privilege have or had substantial potential personal liability to the estate aggregating over \$4,000,000 as described in Appendix A. The potential liability of insiders to the estate shows both the great value to the estate of control over the assertion or waiver of the privilege and the potential abuse when this control is given to former management.

Those who would benefit from the assertion of the privilege, such as the CDCB insiders here, use the debtor corporation's privilege to protect themselves as individuals, not to protect the corporation. The conflict between their interests and the Trustee's interests arises from their own culpable acts and omissions, not from any preference by the Trustee of creditors over shareholders. The Trustee represents the entire estate, 11 U.S.C. § 323(a), and as such must act in the best interests of the entire estate. *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1194 (8th Cir. 1981). It is in the best interest of the estate that the Trustee, as representative of the entire estate—and not former management who seek to avoid additional personal liability—control the debtor's attorney-client privilege.

C. The Decision Below Is Contrary To The Rulings Of Other Courts

As the Solicitor General pointed out in his brief, the decision of the Court of Appeals conflicts with the decisions in several circuits.² Furthermore, the ruling below is contrary to rulings on the attorney-client privilege in other

²Compare the decision below with *Citibank, N.A. v. Andros*, 666 F.2d 1192 (8th Cir. 1981); *In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383 (2d Cir. 1982); and *In re Boileau*, 736 F.2d 503 (9th Cir. 1984) petition for reh'g pending (filed July 13, 1984). See discussion in the Petition submitted by the Solicitor General at pp. 5-8.

situations where the natural representatives of legal entities are replaced by other representatives. In *United States v. De Lillo*, 448 F. Supp. 840 (E.D.N.Y. 1978), the court found that an almost entirely new Board of Trustees of a pension fund had the power to waive the attorney-client privilege between an attorney and the former Board. Similarly, the courts have held that a corporation may waive the attorney-client privilege against the wishes of the individual officer who made the communication. E.g., *United States v. Piccini*, 412 F.2d 591, 593 (2d Cir. 1969); *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D.Mich. 1977), aff'd per curiam, 570 F.2d 562 (6th Cir. 1978). Thus, the right to control the attorney-client privilege is an asset of the corporation, not an asset of the particular officers or directors of the corporation. In bankruptcy the corporation's assets are transferred to the estate, and the control of the attorney-client privilege should belong with the Trustee as the representative of the estate.

CONCLUSION

For the reasons stated above, the Trustee requests that the Solicitor General's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A LIST OF POTENTIAL INSIDER LIABILITY

Name and Position	Case	Description
1. Gary Weintraub —inside counsel	No action filed	\$100,233.87 deficit balances in trading accounts of Weintraub and his father, Martin Weintraub. Settled by payment to Trustee of \$75,000.00. See Amicus Appendix, p. 58.
2. Frank H. McGhee —President and Director but not a Shareholder	80 A 2142 82 A 3930	Action to recover \$2,034,648.34 deficit balance and other counts. Action to recover \$40,000.00 in fraudulent or preferential transfers to his mother, Ellen H. McGhee.
	82 A 3923	Action to recover \$651,707.20 for debit balances, fraudulent transfers, conversion and other claims.
	82 A 3925	\$2,115.00 claim for fraudulent transfer.
3. Andrew McGhee —Officer, Director, and Shareholder	82 A 0545 81 A 1530	Action to recover, debit balances and preference of \$768,345.40. Action to recover \$125,634.27 in fraudulent transfers. (F. McGhee and Larry Cote also co-defendants).
	80 A 2143	Action to recover \$145,504.51 as preferences and fraudulent conveyances.

<u>Name and Position</u>	<u>Case</u>	<u>Description</u>
4. Stanley Berg —Shareholder	82 A 3824	Action to recover property of the estate believed to be in excess of \$25,000.
5. Arthur A. Berg —Affiliate of Stanley Berg	82 A 2360	Action to recover fraudulent transfer and debit balances totaling \$205,696.13. Berg was involved in financing the purchase of CDCB by the McGhees and Larry Cote.
6. Larry Cote —Vice President, Secretary, Director and Shareholder	82 A 3924	Action to recover preferential transfer of \$43,950.
7. Paul Rabrich —Shareholder	Objection to Claim filed November 9, 1982	Objection to customer claim and general claim totaling \$30,828.50 on grounds of cross-collateralization agreement first found in one of CDCB's attorney's files.
8. Dr. Wayne B. Tate —Shareholder	82 A 3887	Action to recover debit balance of \$14,002.60, and to apply cross-collateralization agreement first found in one of CDCB's attorney's files.
9. Shirley Taetle —Accountant	82 A 3932	Action to recover \$14,332.27 deficit balance, which had been reversed by a "phantom" credit.
10. DBD Trust Group and Donna Weiner —Affiliates of auditing firm	82 A 3933 82 A 3935	Actions to recover deficit balances aggregating \$63,109.17.